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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 787

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,

Petitioner.

vs.

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, JOHN PETER CHRISTENSEN, ANNA CHRISTENSEN, JOHN H. BUSCH, JR., PETER VISSER and WILLIAM STERNBERG,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MYRON D. ALEXANDER,
MILLARD C. EISEMAN,
ALBERT LANGELUTTIG,
Counsel for Respondents.

CHAMPLIN-SHEALY COMPANY, CHICAGO 265

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Before considering the matters presented in the Petition for *Certiorari* the question of the jurisdiction of the Court in view of the status of the case should be presented:

JURISDICTION.

While the Supreme Court may, it will not ordinarily take jurisdiction of a cause by *certiorari* before a judgment is entered finally disposing of a case in the lower courts.

American Const. Co. v. *Jacksonville Rwy.*, 148 U. S. 372, 378, 384.

The Conqueror, 166 U. S. 110, 113.

Panama R. R. v. *Napier Shipping Co.*, 166 U. S. 280, 284.

Hamilton Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 258.

Chicago & N. W. Ry. Co. v. *Osborne*, 146 U. S. 354.

Bruce v. *Tobin*, 248 U. S. 18.

Attention is called to the order of the Circuit Court of Appeals reversing and *remanding* this case (R. 119) to the trial court, where on the motion for summary judgment, a *single* issue was presented—namely the question of the propriety of the manner of the approval of the reinsurance agreement by the Superintendent of Insurance of Ohio (R. 58-60, 111-112). The Circuit Court of Appeals went to great pains to point out and leave open an important question for consideration of the trial court on the retrial of the case (R. 116, 118).

This Court should not be called upon to dispose of cases piecemeal.

STATUTES INVOLVED.

Since *all* of the pertinent statutes are set out in the record (R. 84-90), we believe that a further printing of them either in the petition for *certiorari* or here is not warranted. The selections made by petitioner (pp. 3-5) omit the very important provisions of section 9358 of the Ohio

Code (R. 89). It seems curious that in making its selection of statutory material, petitioner avoided printing section 9358 upon which respondents laid considerable stress in the lower court. Indeed, it does not advert to this section anywhere in its petition.

STATEMENT—CORRECTIONS.

As stated above the Circuit Court of Appeals not only reversed the decree of the trial court, but remanded the case to the District Court (R. 119) (Petition P. 5).

Petitioner was made a party to respondents' Complaint *not* because it had agreed to reinsure the risks of the American Old Line Life Insurance Company (Petition P. 6), *but* because it had agreed "to discharge all of the * * * liabilities of" the American Old Line (R. 32). As a result of this contract, American Old Line "ceased doing business and distributed all of its * * * assets to the stockholders" (R. 47).

As we shall hereinafter show, the liability of the American Old Line on the bank stock held by it was neither "contingent in incidence" or "uncertain as to amount" (Petition P. 7).

Petitioner fails to point out (Petition P. 9) that it was charged with the duty of complying with Ohio law (R. 114), and that after the approval of the contract by the Ohio Superintendent of Insurance alone, it carried out the contract (R. 78, 79). If this reinsurance agreement is to be stricken down here, it must be stricken down in its entirety and the many policy holders of American Old Line are left without insurance. The view of the Circuit Court of Appeals on this point is found in its opinion (R. 114).

With regard to the conduct, historically (Petition P. 9), of the insurance authorities of Ohio we call attention to the opinion of the Circuit Court of Appeals (R. 115). Even

in the case of the reinsurance of the Omaha Life, the Ohio statute was not "*strictly*" complied with (Petition P. 9). It is to be noted that even in that case the Commission was made up of the Superintendent of Insurance and a representative of the Governor, and a *representative* of the *Attorney General.* The statute provides that only the Governor may appoint a representative to serve in his absence (Sec. 9354—R. 87-88) on the Commission.

The petitioner was *not* entirely "forbidden to acquire bank stock" (Petition P. 9). See Section 9358 (R. 89).

BRIEF.

I.

Bank Stockholders' liability in Illinois is neither "contingent in incidence" nor "uncertain as to amount."

Throughout its petition in this Court, petitioner repeats in a dinning song the phrase "contingent in incidence and uncertain as to amount."

It is significant that nowhere in the petition are these words explained so far as their application to the case at bar is concerned. In spite of this bold and repeated assertion no attempt is made to support it by reference to any Illinois authorities.

The opinion of the Circuit Court of Appeals which is very careful to outline the controversy as presented in the briefs before it, nowhere mentions such a contention. The fact of the matter is the trial court and the Circuit Court of Appeals sitting in Illinois are well acquainted with the nature of bank stockholders' liability under the Illinois Constitution and counsel did not have the effrontery to make any such contention there.

Bank stockholders' superadded liability is imposed by the Constitution of Illinois of 1870 (Act. xi, Sec. 7), which reads as follows:

> "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."

This provision is self executing, requiring no legislative provision for its enforcement. The nature of the liability thus imposed is that of limited partners directly to the creditors who were such while the stockholders held their stock. It is not necessary that a bank be insolvent to enforce the liability. If a payment is not made on demand, the stockholder as a limited partner becomes directly liable to the creditor. The creditor's right is direct, not derivative and the liability of the stockholder is the face amount of his stock limited only by the amount due the creditor. Sale of the stock does not terminate the liability and each successive holder is liable for the face amount of the stock. It is usual to recover, in a proceeding by the creditors to enforce the Constitutional liability, several times the capitalization of the bank.

A few of the leading cases outlining the nature and extent of this liability follow:

Golden v. *Cervenka,* 278 Ill. 409.
Sanders v. *Merchants State Bank,* 349 Ill. 547.
Heine v. *Degan,* 362 Ill. 357, 366 *et seq.*
Comstock v. *Morgan Park Bank,* 367 Ill. 276.
Burnet v. *West Madison State Bank,* 375 Ill. 402, 406 *et seq.*

This last case was decided on February 12, 1941.

II.

The claim of respondents is neither "a bit of 'legal grace'" nor one "fortuitously discovered."

On page 14 of the petition, an *ad hominum* argument, unsuccessfully made to the Circuit Court of Appeals is thrown in.

The fact is, petitioner is trying to get out of an obligation which it assumed when it put the American Old Line Life Insurance Company out of business and required its dissolution and the distribution to its stockholders of its assets, putting the assets out of reach of respondents.

It is to be noted that immediately upon the consummation of the reinsurance agreement, the American Old Line Life Insurance Company, went out of business on January 10, 1931 (T. 47), and distributed all of its assets to its stockholders. The dissolution of the American Old Line Life Insurance Company was made in accordance with the provisions of the insurance laws of Illinois then in force. (Smith-Hurds Ill. Rev. Stats. 1929, Chap. 73, Sec. 504.) It is to be noted from this section that in order for the American Old Line Life Insurance Company to so dissolve, affidavit had to be made that all of its liabilities had been met. If appellee had not consummated the reinsurance agreement, agreed to discharge the liability of the American Old Line to appellants, and turned over in cash to American Old Line Life Insurance Company to distribute among its stockholders the sum of $781,720.00 (T. 46), the American Old Line Life Insurance Company would have been in business and in a position to pay its stockholders' liability sought to be enforced in this suit. We fail, therefore, to see how it can be said that appellants are doing anything other than following their just rights

in an effort to enforce the protection given them by the Constitution of the State of Illinois. (Article XI, Sec. 6.)

Of course, appellee's obvious attempt to impress this Court with an *ad hominum* argument has nothing to do with the legal issues presented in this cause, but we thought it well to point out that even this argument is not well founded.

III.

The fact that the re-insurance agreement between the American Old Line Life Insurance Company, and petitioner, was approved by the Superintendent of Insurance of Ohio alone, and not by the Commission provided for by the statute, does not render the re-insurance agreement void, since the said provisions of the Ohio statutes are directory merely, and not mandatory.

We wish to call attention to the fact that this point answers the only contention made by petitioner in its motion for summary judgment in the trial court (R. 58-60).

We believe that the Circuit Court of Appeals has adequately disposed of this contention in its opinion (R. 112-116) with ample citation of Ohio authorities which alone govern this case.

Erie Railroad v. *Tomkins,* 304 U. S. 64.

It clearly appears from the opinion of the Circuit Court of Appeals that contrary to the statement (Petition P. 15) of petitioner, that court based its opinion on and properly interpreted the Ohio statutes and cases.

IV.
Ultra vires.

Questions 1 and 2 argued by petitioner here are encompassed in the consideration by the Circuit Court of Appeals of the question of whether or not the assumption by the petitioner of the liability of American Old Line on the bank stock was *ultra vires* (R. 116-118).

The question of the effect of the non-compliance strictly with the statutory provisions of the Ohio Code referred to in the preceding point is encompassed within the large problem of *ultra vires* in corporate transactions. The case was so treated by the appellee in the trial court and by the Circuit Court of Appeals and will be discussed here. It will be noted from an examination of the re-insurance agreement in question in the case at bar (R. 32) that the appellee took over the entire business of the American Old Line Life Insurance Company, took over all of its policies, assumed all of its liabilities and paid to the Old Line Life Insurance Company a substantial sum of money.

While the appellee does not assert in its motion for summary judgment (R. 58-60) that if this re-insurance agreement had been approved by the Commission in Ohio, in strict accordance with the Statute, it would not be enforceable, it may be argued that the broad problem of *nltra vires* is presented. Certainly re-insurance agreements are permitted by the statutes and in connection therewith there is no contention made, but that the appellee could pay a substantial sum of money in connection with the taking over of contracts of insurance. It seems to follow logically that if part of the consideration for the assignment of the insurance policies is the payment of liabilities rather than the payment of cash, there can be no contention that this was beyond the powers of the

Ohio Corporation. The statutes (Sec. 9351, R. 87) recognize that insurance companies may enter into re-insurance agreements and if the assumption of the liabilities of the American Old Line Life Insurance Company was undertaken rather than the payment of cash, can it be said that the exercise of this incidental power was not encompassed in the power to enter into such contracts? We respectfully call attention to the discussion of this point by the Circuit Court of Appeals (R. 117).

The most that can be said here is that the contract of re-insurance was not *ultra vires* the appellee, but that the method of its approval was not entirely in accordance with the manner prescribed by statute.

Careful authorities have pointed out that where a corporation has power to undertake a certain course of conduct, the failure to comply with conditions or formalities does not involve a question of *ultra vires.*

Fletcher Enc. Corporations, Perm. Ed., Vol. 7, Sec. 3402.

A discussion of *ultra vires* when asserted in a law suit always leads to a great deal of confusion. As so often occurs, introduction of a foreign word into American or English law is simply a cover for confused thinking.

Fortunately, we are confronted with an Ohio statute and our only concern is to ascertain the extent of the doctrine of *ultra vires* in that State.

In years gone by, a consideration of this case in this court would have required a discussion of the theories of *ultra vires* entertained by the Federal courts which, authorities agree, are distinct from the rules applied in most States.

Fletcher Ency. Corporations, Perm. Ed., Vol. 7, Sec. 3468 and following.

Ohio Jurisprudence, Vol. 10, p. 843, Sec. 622.

Since the case of *Erie Railroad* v. *Tompkins* (1937), 304 U. S. 64, 82 L. Ed. 1188, our interest is solely in the meaning of the Ohio statutes as interpreted by the Ohio courts.

As in most states today, Ohio has now abolished the defense of *ultra vires.*

Ohio Jurisprudence, Vol. 10, p. 827, Sec. 614.

Even before the adoption of the Ohio statute, abolishing the defense of *ultra vires,* however, the courts in the State of Ohio had arrived at substantially that result.

Ohio Jurisprudence, Vol. 10, p. 828, Sec. 615 and following.

The law in Ohio with regard to *ultra vires* is well summarized in *Ohio Jurisprudence,* Vol. 10, pp. 830-31, Sec. 615.

The latest expression on the subject of *ultra vires* in the courts of Ohio is found in the case of *London & Lancashire Indemnity Co.* v. *Fairbanks Steam Shovel Co.,* 112 Oh. St. 136, 147 N. E. 329 (1925). In that case the defendant company claimed that it was *ultra vires* for it to have executed a contract of indemnity to the plaintiff. The court rejected this plea, saying (p. 145):

> "Moreover, the defendant cannot here raise the question of *ultra vires,* for the contract has been fully performed by the indemnity company. The contract was performed by that company when it executed the bonds. Generally speaking, the rule of *ultra vires* is enforced in its drastic features only where contracts made by private corporations are wholly executory upon both sides. But where the *ultra vires* transaction is executed on one side, a private corporation is estopped from claiming that a transaction was *ultra vires* to the extent it has been performed by the other party. *Day* v. *Spiral Springs Buggy Co.* 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; 14 A Corpus Juris, p. 318.

"This rule is based upon the consideration that, as between private corporations, one party cannot receive the benefits which are embraced in total performance of a contract made with it by another party and then set up the invalidity of the transaction as a defense. *Arkansas Valley Town & Land Co.* v. *Lincoln*, 56 Kan. 145, 32 P., 706; *Western & Southern Fire Ins. Co.* v. *Murphy*, 56 Okla., 702, 156 P. 885; *Manchester & Lawrence Rd.* v. *Concord Ry.*, 66 N. H. 100, 20 A. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; *Kelly* v. *Central Union Fire Ins. Co.*, 101 Kan. 91, 165 P. 806, L. R. A. 1918 C, 1170; *Eckman* v. *C. B. & Q. Rd.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750."

The case of *Western & Southern Fire Ins. Co.* v. *Murphy* (1916), 56 Okla. 702, 156 Pac. 885, cited by the Ohio Court, involved a plea of *ultra vires* by an insurance company. In this case Murphy was President of the insurance company. He entered into a contract providing for his resignation and the purchase from him of his stock in the insurance company. Upon his suit to enforce the contract the insurance company pleaded *ultra vires*, but the court sustained Murphy's action on the contract on the ground that Murphy, having fully performed, the insurance company could not be heard to deny the validity of its undertaking.

Likewise the case of *Kelly* v. *Central Union Fire Insurance Company* (1917), 101 Kans. 91, 165 Pac. 806, cited by the Ohio court, involved a plea of *ultra vires* by an insurance company. The insurance company had agreed to repurchase the stock of Kelly in order to reduce an oversubscription to its stock. The stock was of the par value of $10; the price paid by Kelly was $12.50 a share and the agreement to repurchase was for $15 per share. The insurance company claimed its contract was *ultra vires* but the court enforced the contract. See p. 809.

Other earlier cases expounding the Ohio doctrine of *ultra vires* are:

Hays v. *Galion Gas Light & Coal Co.* (1876), 29 Oh. St. 330, 340.

Larwell v. *Hanover Savings Deposit Society* (1883), 40 Oh. St. 274, 283, 284.

It thus appears that even aside from statutes the courts of Ohio have placed that State squarely on the proposition that a corporation, which has received the benefit of its contract, cannot take advantage of its alleged *ultra vires* act to the detriment of those with whom it has contracted or those claiming through the person with whom it has contracted.

We have been unable to find any cases specifically interpreting the Ohio insurance statutes and in the absence of a holding by the courts of Ohio that the insurance statute have changed their uniform holding with regard to the plea of *ultra vires* we submit that it must be concluded that the plea of *ultra vires* in this case is not well founded. The Appellee has received and still retains all the benefits of the re-insurance agreement.

Petitioner makes the contention that an Ohio Insurance Company could not invest in bank stocks. This may very well be conceded in a situation where the corporation might have made an original investment in such stock. It seems, however, that in connection with its re-insurance agreement the appellee could even have become the owner of this stock. (See Section 9358 (T. 89).)

In any event appellants do not base their claim upon a contention that appellee was ever the owner of this bank stock. The fact of the matter was that the American Old Line Life Insurance Company had certain assets and certain liabilities. Among the latter, was a liability on the bank stock held by it. Apparently the assets of the Amer-

ican Old Line exceeded the liabilities and on a presumably favorable basis appellee agreed to take over the assets, assume the liabilities and pay the American Old Line for its stockholders a substantial sum of money (R. 32-34—especially paragraph 11), and the appellee did pay over the sum of $781,720.00 (R. 46). Appellee apparently reduced its payment to the American Old Line by the sum of $139,800.00, because of the liability of the American Old Line on account of its bank stockholdings. The appellee apparently could have paid the additional $139,800.00 and been relieved of this liability, but in that event the American Old Line could not have gone out of business until its bank stock liability had been fully discharged.

Smith-Hurd Ill. Rev. Stats. 1929, Chap. 73, Section 504.

Since this is a matter clearly governed by Ohio law, we will not burden the court by discussing cases cited by petitioner from other jurisdictions. We will confine our comment to the Ohio cases cited.

The case of *Ulmer* v. *Fulton,* 129 Oh. St. 323, involved an insolvent trust and savings bank and concerned trustee's duties. Incidentally comment was made upon the rule of *ultra vires* as applied to national banks. Just as now the Federal Court give due deference to State Authorities on questions of state law, so Ohio gives due deference to the Federal rules of *ultra vires* in connection with national bank.

So the case of *Gress* v. *Fort Laramie,* 100 Oh. St. 35, involved a national bank and Ohio courts applied the federal rules of *ultra vires.*

The case of *Norwood Sash & Door Mfg. Co.* v. *Logsdon,* 65 Oh. App. 254, involved a bank and the court held that banks could plead *ultra vires* where other corporations could not.

The case of *Gardner* v. *Johns,* 64 Ohio App. 229, involved a Building and Loan Association. The association had taken a deed to a piece of property on which it had a first mortgage. In the deed it assumed taxes and "liens." There was apparently a failure to realize that a second mortgage was present. The Association pleaded *"ultra vires,"* but the decision went on the fact that the second mortgagee had given up nothing and the Association had received nothing but, indeed, had lost the property.

In *Hackett* v. *Kupke,* 62 Oh. App. 89, it was held that one who purchased bonds from a bank on a repurchase agreement *could* recover on *quantum meruit.* This case is exactly contra to *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, applied to national banks.

It seems to us that the Circuit Court of Appeals has correctly applied Ohio law in a matter of strictly Ohio concern. There is no support in authority and no reason to put insurance companies in the same class as banks.

CONCLUSION.

We agree with petitioner that this matter is governed strictly by Ohio law. We have consistently urged this point in arguments and briefs in the lower court. We submit that there *can* be no applicable decision of this Court with which the decision of the Circuit Court of Appeals can be in conflict. The Circuit Court of Appeals properly interpreted the applicable law of Ohio.

We submit that the petition for *certiorari* should be denied.

Respectfully submitted,

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